THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

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Mr. Melvin Spaeth
Arnold & Porter
1200 New Hampshire Avenue, NW
Washington, DC 20036

Dear Mel:

I am sorry to have taken so long to get back to you, but I have had to get over the press of other work at the law school. I have however had a chance to reflect upon the mock trial, and will give you my observations. I have not yet spoken to anyone at the office about the full course of the event; I have not seen the deliberations, and I do not even know the verdict. What I say should therefore be taken more as the opinion of the 27th juror in the box, and less as a lawyer involved in the case. I know that I might be belied by other evidence, but think that my initial impressions are worth more at this stage than any guarded ones I might provide.

My bottom line is that the assumption of risk evidence is far more powerful than the medical causation evidence, and that the later should only be used in order to advance the strength of the former. To elaborate, it seems clear to me that the evidence which suggests that that there is some real controversy over whether, as a general matter, cigarettes cause cancer is simply too weak to be made an essential part of our case. To be sure there is no lock step correlation between cigarettes and lung cancer: we know that the conditional probability of getting cancer when not smoking is not zero, while getting it when smoking is not 1. But the probabilities of getting it with are far higher than the probabilities of getting it without. In addition, it is more than a simple question of positive correlation, such as might be found between the level of apple consumption in Great Britain and the number of common colds in Chicago as a defense witness (Dr. Frank Ward?) suggested at trial. We have with cigarettes clear evidence of contact, and knowledge that chemical and physical irritations can interfere with the ordinary life processes. We have in addition demonstrative evidence (not introduced at all at this trial) which shows the difference in the condition of the lung tissue of smokers and nonsmokers. All that is missing is precise mechanism. As a lawyer or expert for the plaintiff I could easily agree that simple correlation does not establish causation, and then argue that here we have far more than that

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correlation, for the reasons just stated. I think that it strains credibility to argue that the nexus in this case is random. I have been at a fair number of meetings on toxic torts, and have looked for newspaper accounts of proof of causal connection in epidemiological studies. In each and every case the positive connection between cigarettes and cancer is the baseline against which all other studies are measured. To say that the general connection is not made out is to say (in ways that were not put to our medical witnesses) that there is no connection whatsoever that can be made out unless the zero/one conditional probabilities are satisfied, as were required under the old nineteenth century canons of investigation first developed by Koch. Once that implication is spelled out, no one will buy it. Instead we invite an endless procession of indignant physicians whose testimony will weaken the credibility of our overall position. I know that the companies are very reluctant to abandon a position that they have hewed to for so long, but the position is intellectually indefensible, and little is gained by keeping with it to the point that it damages credibility of parts of our case that are quite powerful.

In this phase of the case, there is also a second line as to whether this particular lung cancer was caused by smoking. Here I am told that with oat cell carcinomas, virtually none have been found in patients that have not smoked. (It is as though the zero condition, without smoking, is satisfied, even though the one, with smoking, is not.) With the carcinoids the evidence is obviously weaker because the condition is so much rarer. But here the one study cited said that 16 out of 17 cases so identified were in smokers, and the wry plaintiff's lawyer could argue that our case shows that the true number is at least 17 out of 18. But even if we could win in this case, so what? What is the point of running a strategy that dooms us to failure in the 99 percent of the cases that remain? Indeed as a member of the plaintiff's bar interested in the long term implications, I should be quite happy to lose a case on the ground that carcinoids fall outside the area of general causation, for I could then use that to explain in all other cases that the one line of defense good for the defendants is denied them.

But as I noted early on, it does not follow that the evidence on causation is irrelevant to the case. It is critical to the risk/utility, assumption of risk and warning issues. The expression "smoking causes cancer" conjures up the deterministic image, when what is really at stake is the model of increased risk or hazard. A central part of any successful defense is to make sure that the jury understands that the language of the cigarette warning is a probabilistic, not a deterministic statement. It helps one to understand why it may be rational for people to smoke, just as it is rational for them to eat eggs, or to fly hanggliders. The risk may be outweighed by the (subjective) benefits. In effect therefore noting the low level

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of the increased risk, noting that it is dose related, noting that the potency of cigarettes has gone down as the information about their possible dangers become more widely circulated, is a way of saying that the world has behaved rationally in response to the information that has become available over the years. One can argue consistent with this that there has always been common knowledge that cigarettes smoking has some increased risk or hazard, and that Rose Cipollone knew that risk and was prepared to run it. But it puts us on the right side of the question, and forces the plaintiff's expert to switch gears from the question of, is there a positive correlation?, to the question, what is the positive correlation, and how much evidence sustains it? At this point they will have to hem and haw because there is stuff that indicates that it may be lower than expected, or that the onset is later than expected (relevant to any risk/benefit calculation) or the ability to beat the risk by quitting at 40 is greater than expected (ditto).

In addition, it permits us to introduce evidence of politics on the other side. I recall one study which showed that smoking one or two low tar/low nicotine cigarettes produced no increased risk or hazard. Yet (again by recollection) the study was suppressed because it was thought to be socially inexpedient, in that the public might misinterpret it even if true. It is kind of a negative fraud that can be exploited effectively in general, and might account for the good intuition of Cipollone's physician to switch to True.

The case can then be expanded on several fronts. I thought that our awareness fellow was quite effective because his testimony showed that the risks had into common language (King James, coffin nails, cancer sticks) very early on; and it becomes possible to read the Reader's Digest article into the record. Here it becomes very hard for the other side to use the line that we can use with some of the bad (Rosalind Russell, L & M advertisement) that there is no evidence that she saw it. Our evidence is that every syllable of ordinary language pointed to the knowledge that she had to have. In contrast what importance can be attached to a bad ad on the causation question. It was one campaign, it was one for a short time, and she continued to smoke L & Ms for nearly 13 years after the campaign was withdrawn. On the question whether there was enough for her to make an informed decision in the world at large, we win -- one could almost dare to hope, as a matter of law.

In addition one can hit the subjective limb of assumption of risk. The excerpts from her deposition were in my view the most powerful testimony on our side. They dispel the point that any change in warning could have done more than the combined influence of husband, family and friends. The knowledge in this case, and doubtless in others is complete, at least as modern science (with its imperfect dosage-response knowledge would have it.)

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The point, moreover, gives a handle to beat the comparative negligence issue by resort to a second strand of the causation argument, mental causation. The duty to warn cases presuppose that the want of information from the warning influenced the behavior of the plaintiff. But if the plaintiff knew everything that the warning might have conveyed, and more, and if she believed everything that the warning might have conveyed about cigarettes and more, then the breach of duty, if any, had no relevance to the decisions that were made. Hence there is no prima facie case (I would argue as a matter of law) and the case is ripe for judgment in our favor, at least on all duty to warn counts.

The great virtue of putting all the eggs into the assumption of risk basket (with the three compartments, risk/utility, objective and subjective) is that our defense is congruent with the accepted view on causation. It is very had to argue that she assumed the risk of injury at the same time we insist that the general causation of cancer by cigarettes is still an issue of scientific dispute.

In sum my view of the case runs as follows: we use the medical evidence is used to show that probability, not certainty, is in issue. That in turn helps make the risk utility analysis more coherent. (Katz was effective on subjective pleasure, and it is also nice to note that he is correct in theory, as the economics of interpersonal comparisons of utility, subjective value, and revealed preferences shows.) Thereafter one pushes hard on both objective and subjective assumption of the risk both to deny the mental element of causation and to establish the affirmative defense of assumption of risk. The former is clearly an all or nothing decision in our favor, and the later may be. In my view this line on knowledge and mental causation represents what everyone coming into a jury room would think about the case. The trick at trial is not to lose the advantage that ordinary sentiment gives. The risk of making the big medical case is that it does just that.

I might add that at sometime I should like to see the rest of the tapes and talk further about the matter. It was good seeing you and the others in Jersey. The entire Philip Morris team won its battle in a walk. Give my regards to everyone.

Best regards,

Richard A. Epstein
James Parker Hall
Professor of Law

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